PD-0804-19

IN THE COURT OF

CRIMINAL APPEALS OF TEXAS

JOE LUIS BECERRA,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Petition for Discretionary Review from the Tenth Court of Appeals in No. 10-17-00143-CR affirming the conviction in Cause Number 14-03925-CRF-361 from the 361st District Court of Brazos County, Texas

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APPELLANT'S BRIEF ON THE MERITS

ORAL ARGUMENT PREVIOUSLY DENIED

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Trial Judge:	Presiding Judge Steve Smith (Jury Selection) Senior Visiting Judge J.D. Langley (Trial) 361st District Court 300 East 26th Street, Suite 420 Bryan, Texas 77803 Telephone: (979)361-4220 Fax: (979)361-4380

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STATEMENT OF THE CASE[1]

Joe Luis Becerra ("Appellant") was originally charged by indictment with Murder and Manslaughter. A second count of the indictment alleged Appellant was in Possession of a Firearm by a Felon and contained a deadly weapon notice. The indictment was amended by Order signed September 29, 2016. CR 7.

The State gave a *Brooks* Notice filed September 29, 2016 notifying of their intent to enhance Appellant to habitual offender status (25 years to life) if convicted. 2 RR 8. Appellant chose punishment by the court. 2 RR 6.

On March 6, 2017, a jury was selected and seated. 2 RR. In addition to the twelve jurors, an alternate was selected and seated. 2 RR 138. Before the start of the first phase of trial, the State announced they were not proceeding on the Murder or Manslaughter charges and the jury was sworn. 3 RR 9. Following jury trial on the Possession of a Firearm by Felon charge, Appellant was found guilty, and the jury answered in the affirmative to Special Issue Number One – the Deadly Weapon finding. CR 84.

Appellant was assessed fifty-five years in the Texas Department of Criminal Justice. 4 RR 90-91. A Motion for New Trial was filed April 3, 2017, supported by an affidavit signed by a petit juror attesting the alternate juror: 1) participated in deliberations; 2) voted on the guilty verdict rendered; and 3) that no re-vote was taken

[1] Reporter's Record references are abbreviated "RR" with the volume appearing before, page after. The Clerk's Record is abbreviated "CR"

after the alternate was separated and the petit jurors were instructed by the Trial Judge. CR 25. Following a hearing, the Motion for New Trial was denied April 27, 2017. 5 RR 26-27. Notice of Appeal was filed the same day. CR 194.

In a published Opinion, the Tenth Court of Appeals affirmed Appellant's conviction. *Becerra v. State*, __ S.W.3d __, No. 10-17-00143, 2019 W.L. 2479957 (Tex. App. – Waco, June 12, 2019). Appellant filed a Motion for Rehearing on June 20, 2019. The Motion was denied by the Court on July 5, 2019.

Appellant filed his Petition for Discretionary Review in the Court of Criminal Appeals on August 5, 2019. The State filed their Reply to Appellant's Petition on September 4, 2019. Appellant filed a Response to the State's Reply to Petition for Discretionary Review on September 9, 2019. On November 20, 2019 the Court granted Appellant's Petition and ordered briefing in the case, but denied Appellant's request for oral argument.

STATEMENT REGARDING ORAL ARGUMENT

This Court denied oral argument when granting Petition for Discretionary Review. However, Appellant requests reconsideration if, after merits briefing, the issues of first impression in this Court are sufficient to justify oral argument.

GROUND OF REVIEW GRANTED

In *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) this Court held Article V, Section 13 of the Texas Constitution was not implicated unless evidence that a number other than exactly twelve jurors voted on a verdict received by the trial court. The uncontroverted evidence from Appellant's Motion for New Trial was a non-petit juror deliberated and voted on Appellant's verdict. Did the Court of Appeals commit error in holding Appellant's Article V, Section 13 and statutory claims under 33.01 and 36.22 of the Texas Code of Criminal Procedure were procedurally defaulted?

STATEMENT OF FACTS

On March 6, 2017 the elected Judge of the Trial Court, Steve Smith, presided over the jury selection. 2 RR 1. Twelve petit jurors and an alternate juror were selected and all were seated and sworn. 2 RR 138. However, Senior Visiting Judge J.D. Langley presided over the remaining phases of trial. *Becerra* at *1.

Following closing arguments, and without receiving specific instruction, the alternate juror retired with the petit jurors. *Becerra* at *1. About forty-six minutes into deliberations, it was discovered the alternate juror was in the jury room deliberating. *Id.* 4 RR 35. The Trial Court immediately separated the alternate juror from the petit jurors. *Id.*

The Trial Court then conducted a hearing about the alternate juror deliberating, which included an extended discussion of *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) (*"Trinidad II"*). *Becerra* at *1. The Trial Court settled on a proposed verbal instruction, included in the Court of Appeals decision and the argument section below.

Before giving this curative instruction, the Trial Court overruled a defense Motion for Mistrial. The Court of Appeals found this Motion for Mistrial met error assignment specificity requirements regarding the presence of the alternate during jury deliberations. *Id.* at *2. The jury was then instructed. 4 RR 43. The jury retired a second time, finding Appellant guilty, and answering the Special Issue (deadly weapon finding) in the affirmative. 4 RR 46. The jury was polled and discharged. 4 RR 48.

Appellant filed a timely, affidavit supported Motion for New Trial, alleging violation of Article V, Section 13 of the Texas Constitution and Articles 33.01, 33.011, and 36.22 of the Texas Code of Criminal Procedure, that, following hearing, was denied. *Becerra* at *2. Further recitation is deferred to the issues as argued below.

SUMMARY OF THE ARGUMENT

The petit-juror affidavit supporting Appellant's Motion for New Trial was sufficient, and, additionally, the most efficient method of error preservation for appeal of violation of Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure. A violation of these provisions require, as interpreted in *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010), evidence of a vote of more than twelve jurors on the ultimate verdict received. The Motion and supporting juror affidavit contained the extra-record evidence necessary to present to the Trial Court, and later, the Court of Appeals, that the alternate juror voted on the ultimate verdict, and a re-vote was not taken.

Trinidad directed the assertions of Texas Constitutional and statutory error claimed her be conceived as outside influence claims. *Trinidad* at 28. The Motion for New Trial and supporting evidence were drafted with this directive in mind. The post-trial presentation of a Motion for New Trail with extra-record juror evidence follows case law from this Court and Courts of Appeals approving, even encouraging, this method of error preservation in juror misconduct cases.

Additionally, Appellant's denied Motion for Mistrial, made before the curative instruction was given, was also sufficient to preserve error. Though not exclusive, nor even preferred given the later developed evidentiary record, the Motion for Mistrial was sufficient standing alone to preserve error. The Court of Appeals decision that procedural default of all Appellant's claims occurred, no matter when or how asserted,

when no objection was made when the alternate juror appeared to retire with the petit jury is neither consistent with existing law nor the proper standard for procedural default for the claims asserted in this appeal. Finally, if procedural default did occur on Appellant's Article V, Section 13 and Article 33.01 claims, they are -waiver only affirmative rights under *Marin* analysis – an issue now ripe for this Court to decide with the evidentiary record presented.

ARGUMENT

> In *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010) this Court held Article V, Section 13 of the Texas Constitution was not implicated unless evidence that a number other than exactly twelve jurors voted on a verdict received by the trial court. The uncontroverted evidence from Appellant's Motion for New Trial was a non-petit juror deliberated and voted on Appellant's verdict. Did the Court of Appeals commit error in holding Appellant's Article V, Section 13 and statutory claims under 33.01 and 36.22 of the Texas Code of Criminal Procedure were procedurally defaulted?

The 2007 amendments to Article 33.011(b) of the Texas Rules of Criminal Procedure are ambiguous regarding alternate jury service once deliberations begin. This has resulted in confusion for trial courts. *See, e.g. Castillo v. State*, 319 S.W.3d 966, 969 (Tex. App. – Austin 2010, pet. denied) ("The statute does not address what trial courts should do with the alternate jurors during deliberations but prior to the jury rendering its verdict."); ("Unfortunately, the amended statute does not indicate whether the alternate juror should be allowed to be present for and to participate in the jury's deliberations.") 4 RR 38. The legislature has disregarded the entreaty made by Judge Cheryl Johnson in her concurring opinion in *Trinidad v. State*:

> These cases are before the Court because of a missing piece in the statutory amendments to Article 33.011(b); what is the trial judge to do with the retained alternate jurors?
>
> * * *
>
> In any event, we are left to discern, if we can, what the legislature intended. More concise language about what to do with the retained alternate juror would be most helpful.

Trinidad v. State, 312 S.W.3d 23, 30 (Tex. Crim. App. 2010) (*Trinidad II*) (Johnson, J. concurring).

This case has the evidentiary record absent in *Trinidad II,* the last Court of Criminal Appeals case to attempt to confront the problems of the legislative ambiguity. The evidentiary record here is uncontroverted that an alternate juror deliberated and voted with twelve petit jurors on the ultimate verdict in the Trial Court. CR 194. No re-vote occurred after the alternate was removed and the petit jury instructed. Id. Prior to the amendment, the statute was unambiguous: Article 33.011 required discharge of the alternate juror before the petit jury retired to deliberate. *Castillo* at 969. This developed record provides opportunity for this Court to give needed direction bench and bar on this recurring legal issue.

A. *Trinidad II* supports Appellant's claim that a petit-juror affidavit supported Motion for New Trial preserves error grounded in statutory claims under Articles 33.01, 33.011(b) and 36.22 of the Texas Code of Criminal Procedure and Article V, Section 13 of the Texas Constitution

Trinidad II was in front of the Court of Criminal Appeals because the San Antonio Court of Appeals decided *Marin* affirmative-wavier protections applied to Article V, Section 13 of the Texas Constitution in two cases construing the 2007 legislative amendments to alternate jury service. *Trinidad v. State*, 275 S.W.3d 52 (Tex. App. – San Antonio 2008) ["*Trinidad I*"]; *Adams v. State*, 275 S.W.3d 61(Tex. App. – San Antonio 2009) *reversed* 312 S.W.3d 23 (Tex. Crim. App. 2010). Judge Price's authored decision in *Trinidad II* did not answer that specific question, but decided another – a violation of Article V, Section 13 – required evidence of a petit jury vote of more than exactly twelve jurors:

> The [San Antonio] court of appeals found in these cases that the constitutional requirement of a jury composed of exactly twelve members is a waiver-only provision in contemplation of *Marin* [*v. State,* 851 S.W.2d 275 (Tex. Crim. App. 1993], which a defendant must expressly waive in the trial court before it can be said that he has lost it for appeal.
>
> But we need not resolve that question today. Assuming that the court of appeals was correct to address the merits of the appellants' constitutional complaints, we hold that it erred to conclude that the appellants suffered the verdict of a jury of more than twelve members in violation of Article V, Section 13. In neither of the appellants' cases [Trinidad or Adams] was the alternate juror allowed to vote on the ultimate verdict in the case, at either stage of trial.

Trinidad II at 27-28 (emphasis added).

Trinidad II did not hold the Texas Constitutional claim and the Article 33.01 claims were procedurally defaulted, but a lack of record evidence existed there was a vote of more than exactly twelve petit jurors on the ultimate verdict received. *Id.* *Trinidad II* found claims of violation of Art. V, Section 13 and 33.01 should be conceptually analyzed as outside influence claims, grounded in juror misconduct, because of the presence of a non-petit juror could be an outside influence violating constitutional and statutory protection involving petit jury deliberations and verdicts:

> The error in these cases, if any, in allowing the alternates to be present with the regular jurors during their deliberations is more usefully conceived of as an error in allowing an outside influence to be brought to bear on the appellants' constitutionally composed twelve-member juries. As the court of appeals recognized, such error, if any, would be controlled by Article 36.22, which is the statute that expressly prohibits any outside 'person' from being 'with a jury while it is deliberating.' As we have already noted, however, the court of appeals did not expressly address whether this statutory error was subject to forfeiture, consistent with *Marin*.

Trinidad II at 28-29 (citations omitted) (emphasis added).

Whether Article V, Section 13 of the Texas Constitution or Article 33.01 of the Texas Code of Criminal Procedure require affirmative waiver under *Marin* in this case need not be reached. Appellant preserved error for a merits based decision in the manner directed by this Court in *Trinidad II* by conceiving preservation of error as juror misconduct on account of outside influence. These claims generally require the extra-record evidence brought by Appellant in his Motion for New Trial.

Appellant's Motion for New Trial contained a petit-juror supported affidavit that the alternate juror: 1) participated in deliberations; 2) voted on the guilty verdict rendered; and 3) that no re-vote was taken after the alternate was separated and the petit jurors instructed by the Trial Judge. *Becerra* at *2. CR 25. The Waco Court of Appeals decision that error in Appellant's claims, both statutory and constitutional, were procedurally defaulted by the failure to object at the time the petit and alternate jurors retired, regardless of a later filed, petit juror supported affidavit, was the first Texas precedential appellate decision to so hold.

As contended in Appellant's Petition for Discretionary Review, this portion of the Court of Appeal's decision is contrary to long standing error preservation standards in claims of jury misconduct. *See*, *e.g., Trout v. State*, 702 S.W.2d 618, 620 (Tex. Crim. App. 1985) ("A motion for new trial is the proper course to be taken in preserving alleged jury misconduct error for appeal. It is further required that such motion for new trial be supported by the affidavit of a juror or some other person who was in a position to the facts." [citation omitted]) (emphasis added); *See also,*

Menard v. State, 193 S.W.3d 55, 59 (Tex. App. – Houston [1st Dist.] 2006, pet. ref'd). ("In order to properly preserve an error regarding jury misconduct, a defendant must move for a mistrial or new trial.").

The State has consistently argued that these claims were procedural defaulted – to the exclusion of everything occurring thereafter – when the petit jurors and the alternate retired together for deliberations without defense objection. In support, the State has cited to *Trinidad II's* holding that statutory juror misconduct claims under Article 36.22 are subject to the contemporaneous objection rule. This section of *Trinidad II* cites favorably to *Klapesky v. State*, 256 S.W.3d 442 (Tex. App. – Austin 2008, pet. ref'd) in holding Article 36.22 (as opposed to Art. 33.01) is not subject to affirmative waiver under *Marin*:

> We perceive no reason that a defendant should not be deemed to have forfeited the protections of Article 36.22 in the event that he becomes aware of its breach during the course of the trial but fails to call the transgression to the trial court's attention so that the error may be rectified or, barring that, so that the defendant can make a timely record for appeal. For these reasons, we agree with former Presiding Judge Onion that a violation of Article 36.22 is subject to the contemporaneous objection rule – at least so long as the violation comes to the attention of the defendant, as it did in these cases, in time for him to make an objection on the record.

Trinidad at 29 (emphasis added) (citing *Klapesky* at 452).

Klapesky involved a claim of violation of Art. 36.22, before amendment to Art. 33.011 in 2007. Two alternate jurors in *Klapes*ky retired with the petit jurors for deliberations. *Id.* The trial court in *Klapesky* quickly realized the error and took curative

steps, without objection by the defendant or later developed harm in a Motion for New Trial:

> About five minutes [after retiring to deliberate] the trial court had the jury returned to the courtroom, apologized for not releasing the alternate jurors, and discharged the alternates. At the State's request, the trial court instructed the jury not to consider anything said in the presence of the alternate jurors and to begin deliberations. Appellant agreed the State's request was reasonable. The trial court then asked the jury whether deliberations had been commenced. The jury in unison answered, 'No, sir.' Appellant made no objection as the jury then retired to deliberate.
>
> [Defendant] did not raise any issue about the alternate jurors in his motion for a new trial but advances it for the first time on appeal.

Id.

Former Court of Criminal Appeals Presiding Judge Onion, sitting by assignment on the Court of Appeals in *Klapesky*, wrote on the issue of harm in the context of the defendant's lack of objection and unsupported Motion for New Trial:

> Harm to the accused is presumed when a juror converses with an unauthorized person about the case. If the presumption of harm arises, the State has the burden to rebut the presumption by showing no injury or prejudice to the accused. However, the defendant has the initial burden to show that a conversation about the case on trial occurred between a juror and an unauthorized person. The defendant's burden is not satisfied if there is no showing what a reported conversation was about. In this case, the jury told the trial court that it had not begun deliberations in the five minutes that the alternate jurors were in the jury room, and there is no showing of any conversation about the case between the two alternate jurors and the regular jurors during the time period involved. As far as this record is concerned, the jurors may not have commenced to select their presiding juror. Appellant did not originally object nor sustain his initial burden under article 36.22.

Id. (emphasis added).

The common holdings of *Klapesky, Trout,* and *Menard* are that claims involving jury misconduct require supporting evidence, and to avoid procedural default the defendant must bring the issue to the trial court's attention. Depending on context, this can be accomplished in different ways: Contemporaneous objection, *Klapesky* at 452; Motion for Mistrial, *Menard* at 59, or Motion for New Trial, *Klapesky* at 452, *Trout* at 620, *Menard* at 59.[2]

Castillo v. State involved a special instruction and later supplemented instruction to the petit and alternate jurors who were allowed to all retire together. 319 S.W.3d 966, 967-68 (Tex. App. – Austin 2010, pet. ref'd). The *Castillo* analysis on procedural default followed *Trinidad II* on the Article V, Section 13 comparison to juror misconduct claims, but added citation to *Trout* and *Menard*[3] holding:

> Additionally, to the extent [defendant] is alleging a violation of article 36.22, he is essentially arguing juror misconduct. To preserve error caused by juror misconduct, the defendant must either move for a mistrial or file

[2] As to Motions for New Trial preserving error in juror misconduct claims, s*ee also*, [Court of Criminal Appeals]: *Harvey v. State*, 201 S.W.42, 45 (Tex. Crim. App. 1947) (cited by *Trout* at 620); [Third Court of Appeals]: *Castillo v. State*, 319 S.W.3d 966, 970 (Tex. App. – Austin 2010, pet. ref'd); [Fourteenth Court of Appeals]: *Matthews v. State*, 803 S.W.2d 347, 350 (Tex. App. – Houston [14th Dist.] 1990, no pet.); [First Court of Appeals]: *Tate v. State,* 414 S.W.3d 260, 263 (Tex. App. – Houston [1st Dist.] 2013, no pet.); *Ryser v. State*, 453 S.W.3d 17, 39 (Tex. App. – Houston [1st Dist.] 2014, pet. ref'd) (Motion for New Trial with juror affidavits preserved error for merits review); [Thirteenth Court of Appeals]: *Cuellar v. State*, 943 S.W.2d 487, 490-91 (Tex. App. – Corpus Christi 1996, no pet.); *Bath v. Stat*e, 951S.W.2d 11, 17 (Tex. App. – Corpus Christi 1997, no pet.); [Tenth Court of Appeals]: *Gentry v. State*, 259 S.W.3d 272, 280 (Tex. App. – Waco 2008, pet. ref'd); [Fourth Court of Appeals]: *Bratcher v. State*, 771 S.W.2d 175, 191 (Tex. App. – San Antonio 1989, no pet.).

[3] The Austin Court of Appeals also relied on *Trinidad II* that no evidence existed that a number other than twelve voted on the verdict. *Castillo,* 319 S.W.3d at 971 ("[In] this case there is no indication in the record that the alternate jurors voted on the verdict.").

> a motion for new trial supported by affidavits of a juror or other person in a position to know the facts alleging misconduct.

Id. at 970 (citing *Trout* and *Menard* [other citations omitted]).

The Waco Court of Appeals, the reviewing Court from which petition for discretionary review originated in this case, has followed *Trout's* directive. *Gentry v. State*, 259 S.W.3d 272, 280 (Tex. App. – Waco 2008, pet. ref'd) ("Gentry was required to make her alleged jury misconduct claim at a motion for new trial, and no such motion was made."); *Ridge v. State*, No. 10-07-00379-CR, 10-07-00394-CR, 2009 W.L 2838485 (Tex. App. – Waco 2009, pet. ref'd) (memorandum decision) ("Moreover, a motion for new trial is the proper course to be taken in preserving alleged jury misconduct.").

The Court of Appeals in this case cited neither *Gentry*, *Ridge*, nor any other legal authority in finding Appellant's petit-juror supported Motion for New Trial was procedurally defaulted, "because the objection to the presence of the alternate juror was not timely, the complaints raised in [Appellant's] motion for new trial were also not preserved by a timely objection [at time jury retired to deliberate]." *Becerra v. State*, __ S.W.3d __, No. 10-17-00143, 2019 W.L. 2479957 (Tex. App. – Waco, June 12, 2019) at *2.

No Court of Appeals has held contemporaneous objection is the exclusive method to preserve error in juror misconduct cases. In many instances it should be disfavored – the difference in *Trinidad II* and this record is plain. The trial court

instructions in *Trinidad* and *Adams* were not curative. They were instead given to the petit and alternate jurors by those trial courts before deliberations began with an opportunity for defense counsel to object. This led to procedural default of statutory Art. 36.22 juror misconduct claims.

A review of events from the evidentiary record in this case provides context on how the alternate was able to retire, deliberate, and vote on the verdict received by the Trial Court. The record also provides context on why a Motion for New Trial was the most efficient method of preservation under the circumstances.

1. The evidentiary record from trial prior to verdict

The jury was selected, seated and sworn on March 26, 2017 by the elected judge of the 361st District Court, Steve Smith. 2 RR 1. Judge Smith did not mention to the venire that thirteen jurors, twelve petit and one alternate, would be selected and seated during his pre-jury selection remarks. 2 RR 8-17.

The lawyers did not speak during general jury selection to the fact that an alternate juror would be selected along with twelve petit jurors. 2 RR 8-136. Trial Counsel did speak to panel members about their familiarity with Judge Langley. 2 RR 119, 120. Following the seating of the jury, Judge Smith advised the jury that Judge Langley would preside the following day. 2 RR 140. Judge Smith's remarks to the seated jury did not mention twelve petit and one alternate were seated, 2 RR 139-141, but he told the seated jury in connection with the Texas Uniform Jury Handbook that "There are notebooks in [jury room] numbered one through 13." 2 RR 139.

The following morning, March 7, 2017, Judge Langley stated he was not familiar with the facts of the case (TRIAL COUNSEL: "[I] guess the Court's not aware of any of the facts of the case? [TRIAL COURT]: I am not."). 3 RR 8. Following rulings on preliminary issues, Judge Langley explained he would be sitting by assignment for the remainder of the case. 3 RR 36-37. The Trial Court did not mention the alternate juror's selection and presence on the jury before swearing. 3 RR 37-38. Judge Smith and Langley spoke about the seated jury at some point after jury selection because Judge Langley tells the seated jury, "Judge Smith told me that he did not swear you in." 3 RR 38.

The evidentiary record is then silent regarding the constituted jury until the Trial Court excused the jury to begin deliberations. 4 RR 34. Thereafter, the Trial Court, the alternate juror and Court Bailiff appear of record. Neither the State nor Trial Counsel were present. The alternate juror is identified by name in the colloquy. 4 RR 35. The Trial Court gives the time, 10:31 AM, states for the record that the alternate was in the jury room from 9:45 AM until 10:31 AM. Id. The Trial Court states "There was no return of verdict at this point." Id. The Trial Court also communicates a willingness to allow the alternate juror to speak to the attorneys after "we let them know what happened." Id.

Lawyers for both sides are then called to the courtroom. There is no time designation in the Reporter's Record on the length of interruption, but after getting on the record, the Trial Court first mentioned a federal case, stating "So that means

they had to have some information garnered from the [juror's] post-conviction – in a motion for new trial hearing most likely." 4 RR 36.

More significantly, an extended discussion of *Trinidad II* occurred. The discussion included Appellant's Trial Counsel, Trial Counsel for the State, the Chief of the appellate section of the Brazos County District Attorney's office, and belatedly, Appellant, [Appellant's presence is recorded at 4 RR 43].

The Trial Court begins the discussion on *Trinidad II* by stating:

> [TRIAL COURT]: Trinidad versus State looks like it's the most recent. Appeals court erred in reaching the merits of defendant's claim that the presence of alternate juror during deliberations violated 36.22 where defendant's forfeited claims on appeal by failing to object to that trial court's attempt to comply with the amendment of Article 33.011(b) and ran afoul of Article 36.22.
>
> I don't know what that means. Let's see what it means.

Id.

This recitation from *Trinidad II* prompted Appellant's Trial Counsel to ask the Trial Court if "it has to be preserved by a motion on my part?" Id. This question was left unanswered when the Trial Court changed direction and began to discuss a jury note asking about the deadly weapon special issue. 4 RR 36-37, CR 171-78.

The State's trial counsel, on advice of their appellate chief, recommended a curative instruction that would "bring [the petit jury] out [and] instruct them only 12 are supposed to be deliberating. You are not to consider anything your heard from the alternate juror who is no longer part of the deliberations [and] you're instructed that

you have receive all the all the arguments of counsel and basically start over without giving any consideration to what the juror said." 4 RR 37.

The Trial Judge, by then having read Article 33.011(b), realized the ambiguity of the 2007 amendments to the statute saying "Unfortunately, the amended statute does not indicate whether the alternate juror should be allowed to be present for and to participate in the jury's deliberations." 4 RR 38. However, the Trial Judge then went on to read, and opine both on the necessary timing of objection and finality of waiver of any complaint:

> [THE COURT]: We now hold that there was no constitutional violation and that any complaint about a statutory violation was forfeited by the appellant's failure to invoke the statute in a timely manner. We, therefore, reversed the judgments of the court of appeals and reinstated judgments of the trial court.
>
> [TRIAL COUNSEL]: Well, there goes another waiver on my part.
>
> [THE COURT]: So the failure to object to 13 going back in at 9:45 in this case resulted in a waiver.
>
> [TRIAL COUNSEL]: Yes, sir. I think I'm bound to object and request a mistrial to preserve the record.

4 RR 39.

Thereafter, two significant things occurred.[4] First, the Trial Court stated the alternate could still serve on the jury. 3 RR 41. The State says, "[The alternate] should

[4] Significant for purposes of Rule 606(b) of the Texas Rules of Evidence, written on below. This may explain the Trial Court's decision not to repeat what had been said to the alternate earlier – that he would allow them to speak to the alternate. The Trial Court, after reading Article 33.011(b), decided the alternate would not be released.

not be discharged at this point." Id. Second, the Trial Court drafted the curative instruction. The curative instruction drafted by the Trial Court and later read to the petit jury was as follows:

> [TRIAL COURT]: Members of the jury, jury deliberations began at 9:45 a.m. At 10:31 a.m., the Court realized that the alternate juror, [alternate juror], was allowed into the jury room by mistake and [alternate juror] was at that time asked to separate from the jury. [Alternate juror] has been placed in a separate room over here and he will continue to serve as the alternate juror in this case. He simply cannot be present during the deliberations of the 12 jurors.
>
> You are to disregard any participation during your deliberations of the alternate juror, [alternate juror]. And following an instruction on this extra note that the Court received, you should simply resume your deliberations without [alternate juror] being present.

4 RR 41 [presented to counsel for Mistrial Motion], 43-44 [read to jury]; *Becerra* at *2.

The curative instruction did not include the language suggested by the State's appellate chief instructing the petit jury to begin deliberations anew without the alternate and to re-vote, if a vote, if any, had been taken. The State's attorney says of the instruction "That's good, Judge. And did you also want to ask..." 4 RR 42-43, but the rest of the question is stopped by the Trial Judge inquiring of Appellant's Trial Counsel about the curative instruction:

> [THE COURT]: Well, do you have any problem with that, [Trial Counsel]?
>
> [TRIAL COUNSEL]: Not with the instruction, Your Honor, but I think I'm compelled to ask for a mistrial based on the presence of the juror, preserving any error, if any.

[THE COURT]: I understand. In making that objection, do you have any indication of harm at this point?

[TRIAL COUNSEL]: No, sir, I don't at this point.

[THE COURT]: All right. At this juncture, then, your objection will be overruled, but I won't bar you from re-urging it at a later point.

4 RR 44.

Following the reading of the curative instruction, the parties, and Trial Judge, all seasoned and experienced, commenting on the unusual turn of events. The Trial Judge, with thirty years of judicial experience on both County Court at Law and District Court benches remarked, "As long as I do this I still see new stuff all the time. This is just one of those things. 4 RR 45. The jury finally returned a verdict of "Guilty" on the charged offense and "True" on the Special Issue submission. 4 RR 46. The twelve sitting jurors were then polled at the request of Trial Counsel, each affirming it was their verdict. 4 RR 46-48.

2. Post-trial proceedings in the Trial Court

Appellant filed a timely Motion for New Trial on April 3, 2017. CR 25. The Motion included ten exhibit attachments to support the grounds asserted. Id. Included, in addition to the much-discussed petit juror affidavit, CR 42-44, was the seated jury list. CR 75. The jury list names the alternate juror as well as petit juror who signed the affidavit attached to the Motion for New Trial. Id. The affidavit of Appellant's Trial Counsel was also attached, CR 46-48, attesting that he did not know whether the alternate was present and voted on the verdict of guilt. CR 47 [last

paragraph]. Appellant's Motion for New Trial urged all complaints, except the need for affirmative waiver under *Marin*, that were later urged in the Court of Appeals and on discretionary review in this Court. CR 26 [Art. V, Sec. 13]; CR 31 [Art. 33.01, 33.011, 36.22]).

Hearing was held on April 27, 2017 on the Motion. Judge Smith presided. 5 RR 1. All evidence attached to Appellant's Motion was offered into evidence. Defense Exhibits 3-10 were admitted without objection. The primary evidentiary dispute at the hearing on the Motion was the admissibility of the petit juror affidavit. The State objected to the juror affidavit under Rule 606(b) of the Texas Rules of Evidence. The issue may be significant for preservation grounds related to Texas Constitutional and statutory claims urged on appeal and is briefed more fully below.

Appellant argued that the petit juror affidavit was evidence of outside influence meeting the exception of Rule 606(b)(2)(A). 5 RR 8-9. Appellant also argued because the petit juror affidavit did not disclose statements made in jury deliberations, or the deliberative process, except that the alternate had engaged in deliberations, the affidavit was admissible evidence under Rule 606(b)(1). 5 RR 9-10. Additionally, Appellant argued as to the constitutional ground that Rule 606(b)(1) could not exclude evidence of the vote by the alternate on the verdict when *Trinidad II* held this to be the essence of the constitutional violation. 5 RR 1-11.

The Trial Court presciently focused on footnote twenty-four of *Trinidad II* in making the evidentiary call necessary on the petit juror affidavit. 5 RR 11. That footnote reads:

> [Whether] the alternate jurors constituted outside 'persons' in contemplation of Article 36.22 depends, at least in part, upon the Legislature's intention when it amended Article 33.011(b). The State argued on appeal that Article 36.22 was not violated because amended Article 33.011(b) renders an alternate juror a part of the regular 'jury' during its deliberations, so that the alternate juror would not constitute an outside 'person' in contemplation of Article 36.22's prohibition. The court of appeals found the text of Article 33.011 to be ambiguous, however, with respect to this question. *Trinidad* [I] supra, at 59; *Adams*, supra, at 66–67. Resorting, therefore, to legislative history, the court of appeals determined that the Legislature did not intend that alternate jurors should actually participate in jury deliberations prior to any disability of a regular juror, but should instead be separated until such time as they might be needed. Id. Given our ultimate holding, infra, that the appellants forfeited their statutory claims, we leave resolution of this issue for another day.

Trinidad II, fn. 24.

The issue was extensively argued at the hearing:

> [STATE'S ATTORNEY]: [But] I go back to the court of criminal appeal's *Trinidad* [II] opinion to the following and that is this, that the alternate jurors were present in the jury room during deliberations and may have even participated in all but the voting does not mean that the jury was composed of more than 12 members for purposes of Article 5, Section 1[3].
>
> I believe that means that the court of criminal appeals has found -- plus with the reading of 33.011(b) that the presiding juror -- or alternate juror, excuse me, can be in the room. There's no violation for them being in the room. And so if there's no violation for them to be in the room, then how can they be an outside influence?
>
> [APPELLANT'S COUNSEL]: Judge, may I respond very briefly?

[TRIAL COURT]: You may.

[APPELLANT'S COUNSEL]: The -- Footnote 24 that the Court is citing to, the last sentence specifically references that given our ultimate holding here that [appellant] forfeited their statutory claims, we leave resolution for another day.

[TRIAL COURT]: For another day.

[APPELLANT'S COUNSEL]: Yes, sir. So, you know, we're –

[TRIAL COURT]: So you're trying to tell me that this is the other day?

[APPELLATE COUNSEL]: That's exactly what I'm telling you. We are here in -- and *Trinidad* again, says -- I don't have any argument with what [State's Attorney] just said related to participation, but it specifically says if the juror votes, okay, that's a constitutional violation. Now, harm's a different issue, but what we're talking about here is not necessarily the merits. What we're talking about is the admissibility of the evidence that would prove up the fact that the alternate did vote as part of the verdict rendered in the case.

[TRIAL COURT]: All right. My ruling is going to be that I do believe that it could constitute an outside influence. I'm simply overruling [the State's] objection to the affidavit. That's the only thing I'm doing. It [Defendant's Exhibit 1] will be admitted.

5 RR 12-13.

The Trial Court, after hearing the arguments concerning the merits of the grounds asserted in Appellant's Motion for New Trial, denied the Motion, making verbal legal findings that procedural default occurred by lack of objection at the time the jury retired. 5 RR 25-26. The Trial Court did not address Appellant's contention that if some kind of procedural default occurred by not objecting when the jury and

alternate retired to deliberate, it was not the last opportunity for preservation of error asserted in the Motion for New Trial:

> [APPELLANT'S COUNSEL]: The whole idea [of Motion for New Trial] is so that the trial Court's attention is drawn to the error and it has the ability to fix the problem by new trial before the case goes on appeal. So even at this stage, Judge, according to the *Castillo* case there is no waiver because we're bringing a motion for new trial. I would go further and say that [Trial Counsel] by making the motion for mistrial – which the evidentiary record bears out – preserved the error.

5 RR 19-20.

The Trial Court, in denying the Motion, also focused on the importance of the admission of the petit juror affidavit on preservation of error:

> [TRIAL COURT]: If the ruling [admitting the juror affidavit] on 606(b) is incorrect, then clearly you [Appellant] have no evidence to support your motion. And I note that for the appellate court because I feel that possibly this is one of those cases where subsection b does apply and there is an outside influence.

5 RR 25.

3. Motion for New Trial was not the exclusive method of error preservation in this case but because of the extra-record evidence should the preferred method

The Court of Appeals Opinion found procedural default of the Motion for New Trial. Their holding consisted of the following sentence:

> Further, because the objection to the presence of the alternate juror was not timely, the complaints raised in [Appellant's] motion for new trial were also not preserved by a timely objection.

Becerra at *2.

This case and accompanying evidentiary record illustrate why a juror supported affidavit accompanying a Motion for New Trial should be the preferred method of preserving error in this situation. The petit juror affidavit supporting the Motion for New Trial supplied information not available during trial. This method preserved the opportunity to present the extra-record evidence to the Trial Court, and ensured the juror was approached after release from oath and instruction. This conclusion is supported by the Trial Judge's request from Trial Counsel before ruling on Appellant's Motion for Mistrial, "In making that objection, do you have any indication of harm at this point?" 4 RR 44, and the Trial Court's statement after denying the Motion for Mistrial that "I won't bar you from re-urging it at a later point." Id.

Should this Court find Appellant's Motion for New Trial was a proper method to preserve the grounds asserted, then Rule 606(b) of the Texas Rules of Evidence may be part of a procedural default analysis. This would result from the legal issue framed by footnote twenty-four of *Trinidad II*, discussed above at hearing on Motion for New Trial.

However, this Court could also find the Motion for New Trial was a proper method of error preservation without reaching the issue of whether the juror affidavit was properly admitted at the hearing on the Motion for New Trial and leave the issue to be addressed on a merits-decision on remand by the Court of Appeals. The issue is

here briefed in the event this Rule of Evidence is determined to be part of the procedural default analysis on Motion for New Trial on the grounds asserted.

a. Rule 606(b) of the Texas Rules of Evidence is not implicated

The petit-juror affidavit admitted into evidence at the hearing on Appellant's Motion for New Trial did not attest to any statements, mental processes, or incidents occurring during deliberations. The affidavit attested to the participation – as opposed to actual statements – of the alternate juror in deliberations, and the alternate juror voting on the verdict. The applicable portions of the rule are as follows:

> RULE 606: JUROR'S COMPETENCY AS A WITNESS
>
> * * *
>
> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> > (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
> >
> > (2) Exceptions. A juror may testify:
> >
> > > (A) about whether an outside influence was improperly brought to bear on any juror;

TEX. R. EVID. Rule 606(b).

The use of the word "incident" in the Rule 606(b) has never been applied to the act of voting on the verdict. Instead, it is meant to exclude evidence of events

occurring during the deliberative process. *See, e.g., Nichols v. State*, No. 02-13-00566-CR, 2014 W.L. 7779272 at *5-6 (Tex. App. – Ft. Worth 2014, pet. ref'd) (affidavit of defense counsel employee that jurors agreed to average varying terms in prison to reach punishment verdict was properly excluded under rule as "incident."). "Incidents" logically does not – and should not – include the ultimate act of voting on a verdict by the alternate following deliberation. To do so would not only misconstrue the evidentiary rule, but deny to a defendant the ability to prove a violation of Article V, Section 13, as interpreted by Court of Criminal Appeals in *Trinidad II*.

b. The alternate juror's participation in deliberations was an outside influence under Rule 606(b)(2)(A)

The alternate juror, during deliberations and his voting on the verdict, were "outside influences" within the meaning of Rule 606(b)(2)(A). The San Antonio Court of Appeals analysis in *Trinidad I* is here useful. In 2007, the statute was changed from requiring courts to discharge alternate jurors after the jury retired to deliberate. *Trinidad I* at 58. In 2007 the statute was amended to require the alternate to stay until "the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment." Id. citing TEX. CODE CRIM. PRO. Art. 33.011(b).

Article 36.22 wording is mandatory. No one may be present or converse with the petit jury while deliberating except in the presence and permission of the court. Article 36.22 TEX. CODE CRIM. PRO. Article V, Section 13 does not authorize more

than twelve persons to serve on a jury. If the alternate juror was not part of the petit jury, Articles 33.01, 33.011 and 36.22 were violated if the 2007 amendment to Article 33.011(b) did not permit the alternate to be present during deliberations.

The San Antonio Court of Appeals in *Trinidad I* found that because amended Article 33.011(b) did not address the role of the alternate during deliberations and the role, if any, of the alternate in those deliberations – similar to the Court of Appeals in *Castillo* and the Trial Court in this case – that the statute was therefore ambiguous on the issue. *Trinidad I,* 275 S.W.3d at 59.

The Court of Appeals in *Trinidad I* resorted to the bill analysis from the House version of the bill, which explained the change was needed to prevent mistrials occurring when a juror becomes disqualified after the jury has begun its deliberations. *Id.* Perhaps more significant were the House floor debates on the bill. During questions concerning whether the "intent was the alternate who did not replace a regular juror refrain from participating in any juror deliberations in the case." *Id.* The response:

> Yes, sir. As you know, only the 12 jurors who are seated as regular jurors may participate in any jury deliberations. My intent is for alternate jurors who do not replace a regular juror to not participate in any deliberations—whether that be guilt or innocence or punishment—and that the court would direct the alternate jurors to be separated from the regular jurors and to refrain from deliberating or discussing the case unless they are seated as a regular juror.

Id. quoting Texas House Journal, Tex. H.B. 1086, 80th Leg., R.S., 83rd Leg. Day (2007).

The alternate juror's participation in petit jury deliberations was evidence of an outside influence under Rule 606(2)(A). As such, the Trial Court correctly allowed the juror affidavit into evidence at the hearing on Appellant's Motion for New Trial.

. c. Rule 606(b) must yield to the Texas Constitution

If Rule 606(b) is interpreted by this Court to be applicable to the alternate voting and the petit jury absent the alternate disregarding the Trial Judge's instruction, the affidavit should be found admissible under the same logic used by the Supreme Court of the United States in *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017).

In *Pena-Rodriguez*, two juror affidavits alleged a third juror, H.C., expressed a number of racially charged and biased statements during jury deliberations. *Id.* at 862. The defendant in that case, convicted of a lesser charge, nevertheless sought a new trial based on juror misconduct grounds. *Id.* Based on a Colorado evidentiary rule similar to Rule 606(b), the trial court ruled the affidavits inadmissible, and that decision was affirmed up the Colorado state court appeal ladder. *Id.*

The United States Supreme Court after granting certiorari, reversed:

> For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869.

The analogy to this case is that the right guaranteed by Article V, Section 13 of the Texas Constitution cannot be enforced without evidence that a non-petit juror not just participated, but voted in derogation of this guarantee. In a situation in which the judicially promulgated evidentiary Rule 606(b) precludes evidence necessary to enforce a Constitutional right, the evidentiary rule must yield.

B. Contemporaneous objection should not be tied exclusively to the alternate juror retiring with the petit jury, and the Court of Appeal's new standard of "apparent when it happened" does not survive scrutiny

The Court of Appeal's decision was the first to hold that to preserve the Constitutional and statutory claims urged, objection is required – to the exclusion of all other methods – when the alternate retires with the petit jurors to deliberate, rather than when a special or curative instruction is proposed by the trial court. *Becerra* at *2.

This Court, in *Trinidad II*, outlined how the facts of that case and the companion case, *Adams*, required contemporaneous objection to avoid procedural default:

> In each of the instant cases, the trial court announced in open court on the record that it would permit the alternate juror to remain 'with the jury while it is deliberating.' The appellants had every opportunity to object that the trial court's attempts to comply with the recent amendment to Article 33.011(b) [the change in the alternate juror amendment from 2007] of the Code of Criminal Procedure, would run afoul of Article 36.22, but they did not do so. Under these circumstances, we sustain the State's assertion that these appellants have procedurally defaulted their statutory arguments on appeal, and we hold accordingly that the court of appeals erred to reach the merits of their statutorily based claims.

Trinidad II at 29. (emphasis added).

In this case, there was no "announcement in open court on the record that it would permit the alternate juror to remain 'with the jury while it is deliberating.'" *Id.* According to the San Antonio Court of Appeals in both *Trinidad I* and *Adams*, all parties knew this before deliberations began in the trial court, yet the defendants did not object, forcing reliance on *Marin* requirement of affirmative waiver rights to avoid procedural default on appeal. *Trinidad II* at 26.

The Court of Appeals decision on procedural default is inconsistent with this Court's holding in *Trinidad II*. The Court of Appeals holding on the required timing of objection is as follows:

> [The] grounds for [Appellant's] objection to the alternate juror being sent into the jury room were apparent at the time it happened, which was when the jury began deliberations. [Appellant's] counsel was aware that there was an alternate juror selected and that the alternate juror sat with the jury during the trial. There is nothing in the record to indicate that [Appellant's trial counsel] was not present or was in some other way unable to observe the jury panel at the time the jury panel was sent to begin deliberations. Because [Appellant's] counsel did not object at the time the jury was sent to deliberate, his objection and motion for mistrial were not made at the time the trial court was in the proper position to prevent the error, and therefore were not timely.

Becerra at *2 (emphasis added).

This holding – procedurally defaulting Article V, Section 13, Article 33.01 and 36.22 claims – is a step beyond this Court's holding in *Trinidad II* on procedural default on statutorily based Article 36.22 jury misconduct claims:

> We perceive no reason that a defendant should not be deemed to have forfeited the protections of Article 36.22 in the event that he becomes aware of its breach during the course of the trial but fails to call the

> transgression to the trial court's attention so that the error may be rectified or, barring that, so that the defendant can make a timely record for appeal.

Trinidad II at 27-28 (emphasis added).

This language from *Trinidad II* is subjectively phrased. It is trial counsel's actual knowledge of the alternate juror's purported outside influence with the petit jury – by deliberating, or if the evidence supports, voting – that triggers the need for error preservation. This could take the form, depending on circumstance, of objection, objection to a purposed curative instruction, Motion for Mistrial, or, as argued above, a juror supported Motion for New Trial.

In *Castillo* procedural default on the Constitutional and statutory claims – except for Art. 36.22 – turned on variance of trial objection and complaint on appeal to trial court supplemental written instruction, and lack of objection to a later verbal curative instruction. *See, e.g. Castillo*, 319 S.W.3d at 970. The Court of Appeals Opinion in this case is different, much more expansive, and not supported by authority or citation on procedural default based on lack of contemporary objection.

Neither *Trinidad* nor *Castillo* support the error preservation embraced by the Court of Appeals in this case. Instead, the Court of Appeals held procedural default occurred when the alternate juror retired into the jury room without objection because grounds "were apparent when it happened." *Becerra* at *2. The Court of Appeals holding does not consider or discuss that the Senior Visiting Trial Judge, two senior Assistant District Attorneys, the Court Bailiff and Court Reporter were all

present with Appellant's Trial Counsel when the jury retired, yet spoke not a word about the alternate retiring with the petit jury.

C. Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Code of Criminal Procedure require affirmative waiver under *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993)

Article V, Section 13 and Article 33.01 should be construed as waiver only rights under *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993) if procedural default is otherwise found in this case. As already discussed, *Trinidad II* did not reach the question whether Article V, Section 13 of the Texas Constitution and Article 33.01 of the Texas Constitution were waiver only rights under *Marin* analysis.[5]

However, *Trinidad II* did decide that Article 36.22 of the Texas Code of Criminal Procedure, though couched in mandatory terms, was subject to procedural default. *Trinidad* at 29. This holding was subject of contention in the latest opinion from this Court finding a requirement of affirmative waiver in appellate claims of judicial comment on the weight of the evidence. *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017). *Trinidad II* was directly quoted in the *Proenza* majority opinion, and distinguished. *Id* at 798. *Trinidad II* served as a centerpiece in the dissent for the

[5] *Trinidad II* observed that Article 33.01 of the Texas Code of Criminal Procedure was not analyzed by the San Antonio Court of Appeals under *Marin*, but that "Even assuming the appellants need not have preserved this alleged statutory error either, under *Marin*, Article 33.01(a) was not violated any more than Article V, Section 13 was. Because only twelve regular jurors ultimately voted on the appellants' verdicts, their juries did "consist" of twelve jurors for purposes of the statute." *Trinidad II* at fn. 22.

proposition that comments on the weight of the evidence were subject to procedural default. *Id.* at 809 (Keller, PJ, dissenting).

Article V, Section 13 of the Texas Constitution reads:

> Sec. 13. GRAND AND PETIT JURIES IN DISTRICT COURTS:
>
> COMPOSITION AND VERDICT. Grand and petit juries in the District Courts shall be composed of twelve persons, except that petit juries in a criminal case below the grade of felony shall be composed of six persons; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

TEX. CONST. art. V, § 13.

Article 33.01 of the Texas Code of Criminal Procedure reads:

> JURY SIZE. (a) Except as provided by Subsection (b), in the district court, the jury shall consist of twelve qualified jurors. In the county court and inferior courts, the jury shall consist of six qualified jurors.
>
> (b) In a trial involving a misdemeanor offense, a district court jury shall consist of six qualified jurors.

TEX. CODE CRIM. PRO. art. 33.01.

In dictum, this Court in *Trinidad II* implied the Texas Constitutional requirement of Article V, Section 13 that "petit juries in the District Courts shall be composed of twelve persons" was subject to procedural default, using the following analysis:

> From its inception in the Texas Constitution of 1876, Article V, Section 13, has plainly required that 'petit juries in the District Court shall be composed of twelve' members. Trial by jury in a felony case in Texas has long been thought to mean a verdict returned by exactly twelve jurors—no more and (unless up to three jurors should die or become disabled, subject to statutory regulation) no fewer…. Soon after we decided *Marin*, we reiterated that Article V, Section 13's requirement of a jury composed of twelve members 'has been held to be non-waivable even with the consent of the State and the defendant.' [citing *Ex parte Hernandez*, 906 S.W.2d 931 (Tex. Crim. App. 1995)]. But two years later, in *Hatch v. State* [958 S.W.2d 813 (Tex. Crim. App. 1997] we revisited the issue and overruled *Hernandez*, essentially holding that, because the right to a jury trial is itself subject to express waiver, both constitutionally and statutorily a defendant may also waive his statutory right, under Article 36.29(a) of the Code of Criminal Procedure, to a jury verdict rendered by a jury composed of twelve members.

Trinidad II at 26-28 (footnotes omitted except where noted with citation).

Trinidad II explained the logic of *Hatch* stems from Article I, Section 15 of the Texas Constitution, which provides the right to jury trial "shall remain inviolate," TEX. CONST. art. I, § 15, but provides the legislature may regulate the implementation of that right. *Id* at fn. 20; *see also, McMillian v. State*, 57 S.W.2d 125 (1933) ("[T]he Legislature is without power to deny the right of trial by jury, but is not without power to provide for the waiving of such right.).

This being the case, it has been argued that waiver of the right to a twelve-person jury would not run afoul of Article V, Section 13, which in it last clause provides, "[T]hat the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict." TEX. CONST. art. V, § 13.; *see also* TEX. CODE CRIM. PROC. art. 36.29(c) (defendant may agree to waive statutory and

constitutional right [under Art. 33.01 TEX. CODE CRIM. PROC.] to a jury verdict rendered by twelve jurors).

This dictum from *Trinidad II* must be read in light of *Marin*, and this Court's subsequent decision regarding Article 38.05 of this Court in *Proenza*:

> [W]e note that the statute in this case is both (1) couched in mandatory terms and (2) directed at the trial judge herself. There is no ambiguity within the statute as to who bears the ultimate responsibility of compliance with this law—the language of the statute speaks for itself in placing this responsibility squarely upon the judge. [citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991]. The statute speaks neither of 'a party's request' [citing TEX. CODE CRIM. PROC. art. 39.14] nor the 'motion of the defendant,' [citing TEX. CODE CRIM. PROC. art. 38.31] but simply commands that the judge comply.

Proenza at 798.

Art. V, Section 13 and Article 33.01 square with this language from *Proenza*. In both the statute and the Constitutional provision, the language is mandatory, "[petit juries] shall be composed of twelve persons," TEX. CONST. art. V, § 13; "[T]he jury shall consist of twelve qualified jurors," TEX. CODE CRIM. PROC. art. 33.01(a) and is directed, if not to the trial judge, to the authority directly vested in that judge in the clauses preceding the command language. "[P]etit juries in the District Courts..." TEX. CONST. art. V, § 13; "[I]n the district court..." TEX. CODE CRIM. PROC. art. 33.01(a). No request or motion is expected.

It is also true a defendant may waive their right to a jury trial, in Texas with State consent, under both the United States Constitution and the Texas Constitution. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253 (1930); TEX. CODE CRIM. PROC. ARTS.

1.13, 1.14, and 1.15. However, waiver of a defendant's right to a jury trial is not the same right, once a jury is seated and sworn, to have their verdict voted on by twelve persons.

TEX. CODE CRIM. PROC. art. 36.29(c) and Section TEX. GOV. CODE § 62.201 require an affirmative act of consent by the defendant to agree to a verdict of less than twelve persons, unless a juror dies or becomes disabled after trial begins but before the charge is read. TEX. CODE CRIM. PROC. art. 36.29(a).; *Hatch v. State*, 958 S.W.2d 813, 815-16 (Tex. Crim. App. 1997). However, once the Court's Charge is read, consent by a defendant must be secured. TEX. CODE CRIM. PROC. art. 36.29(c). This recognizes the elevated importance and integrity of the jury deliberation, vote, and verdict. The language in *Trinidad II* regarding the waiver of jury, when analyzed in light of *Marin* and *Proenza* auger in a direction that distinguishes the waiver of a jury from the right to a twelve-person jury once the defendant asserts their inviolate right to a jury to decide their case.

Marin decided that "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system." *Marin* at 278. Article V, Section 13 and Article 33.01 of the Texas Code of Criminal Procedure command a twelve-person jury vote on the verdict presupposed the right to a jury trial has been invoked and has proceeded to the critical final stage when affirmative consent is required. Such a right deserves "special protection" under *Marin*. This Court should finally address on this adequate record what could not be

done in *Trinidad II* – that these Texas Constitutional and Criminal Procedure statutory provisions require affirmative waiver before being forfeited.

PRAYER FOR RELIEF

The Court of Criminal Appeals should reconsider the denial of oral argument in this case, grant oral argument, and following submission, reverse and remand this case to the Tenth Court of Appeals with instructions to reach the merits of Appellant's preserved Texas Constitutional and statutory claims.

RESPECTFULLY SUBMITTED,

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CERTIFCIATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

This Brief complies with TEX. R. APP. P. 9.4(i)(2)(D) in that it contains 9,059 words, in Microsoft Word 2019, Garamond, 14 point.

/s/ LANE D. THIBODEAUX
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above has been delivered *via* electronic filing on this the 23rd day of December, 2019 to the following:

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